These notes refer to the Commons Act 2006 (c.26)
which received Royal Assent on 19 July 2006

COMMONS ACT 2006

EXPLANATORY NOTES

BACKGROUND AND SUMMARY

General background

3. There are around 572,000 hectares of common land in England and Wales[1]. Commons were once much more extensive, and in mediaeval times covered most of the least productive lands. Even today, they range from the large hill commons of Wales and the north and south west of England, to the smaller lowland heaths typical of south east England.

4. Most common land is privately owned. Owners of commons (often the lord of the manor) enjoy largely the same rights as other landowners, except that common land is subject to 'rights of common' held by other individuals over the common, and to the special statutory controls that apply under commons legislation. Rights of common have their origin in local custom and include, for example, the right to graze stock, to enable pigs to forage on beechmast and acorns (pannage), to remove peat for the hearth (turbary), to fish (piscary) and to collect bracken or firewood (estovers). A glossary of these and other technical terms used in these explanatory notes may be found at annex A. The rights are enjoyed by specific commoners, usually by virtue of the rights being attached to the property they occupy, often adjoining a common. However, many rights of common ceased to be exercised during the twentieth century, owing (among other factors) to changing agricultural practices, increased motor traffic on roads across unfenced commons, and a decline in commoners' reliance on self-sufficient sources of fuel, timber, animal bedding *etc*.

5. Many commons are still used for agriculture and serve the economic interest of farming communities. They are also valued for their landscape, wildlife and archaeological interests, and for public enjoyment. Over half of common land in England has been designated as Sites of Special Scientific Interest ('SSSIs'). There is a public right of access to nearly all common land, either under the Countryside and Rights of Way Act 2000 or under earlier legislation.

Historical and legislative background

6. The Norman conquest of 1066 saw the introduction of the manorial system in which common land and rights of common have their probable origins. Typically, after the harvests had been gathered in each year from the cultivated land of the manor, the open field strips and hay meadows were made available for common grazing by the animals owned by all those who lived and worked on the manor: these were known as the common fields. In addition, there was usually poorer quality land within the manor which was not cultivated by the lord or his tenants, but might be available for grazing by livestock: this was the 'waste of the manor'. There was also common entitlement

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1 Of which, around 550,000 hectares are registered under the Commons Registration Act 1965 (see below). Further facts and figures about common land are available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/facts.htm.

to other resources, such as coal, peat or brushwood for the hearth, turf for the roof, or fish for the table.

7. Many of these entitlements owed their existence to and were attached to the homes and land (if any) of the manorial tenants, so that the entitlement passed with the occupant of the tenancy. Such rights are described as being 'attached' to land (some other sources may refer to the rights being annexed, appurtenant or appendant to land: any distinction is now for most purposes immaterial). The land to which rights are attached is known as the 'dominant tenement' (the common over which the rights may be exercised is sometimes referred to as the 'servient tenement'). Some rights were either never attached to land, or became severed from the land to which they were attached, and are known as 'rights in gross': these rights may generally be freely bought or sold as incorporeal assets.

8. As time passed, rights of common became recognised and enforceable at law, and some of the earliest case law of England concerns commoners and their rights.

9. It was and remains a general principle of common law that the owners of the soil are entitled to any surplus of grazing on their common land (that is, where the available grazing exceeds that needed to satisfy the commoners' entitlements). Indeed, where there was a permanent excess of land beyond the grazing needs of the commoners' livestock, and other commoners' entitlements, the owner could 'inclose' or 'approve' it (and so remove rights of common from land): the right to do this was confirmed in the Statute of Merton 1235 — the first Commons Act[2].

10. During this period, some land in or close to communities became frequently used by the inhabitants of the community for the purposes of recreation, sports and fairs[3]. Where long-standing use could be shown to have occurred, the courts began to regard the use as customary, and the land was recognised in law as a town or village green with protection from interference.

11. Increasing interest in better, more efficient and more profitable agricultural production during the eighteenth century encouraged landowners to improve the productivity of common land by inclosing it. Initially, this was achieved by agreement or more often by private Acts of Parliament, but general legislation, such as the Inclosure (Consolidation) Act 1801 and the Inclosure Act 1845, was eventually passed to facilitate inclosure and reduce the burden on Parliament.

12. But the emphasis changed in the latter half of the nineteenth century away from inclosure and towards the regulation of commons, in recognition of their value as open space and for recreation. The Metropolitan Commons Act 1866 and the Commons Act 1876 saw the first general legislative measures largely intended to protect and manage — rather than inclose — common land[4]. The Commons Act 1899 conferred new powers for the management of common land to be vested in local authorities. Further legislation in the Commons Act 1908 enabled commoners to apply collectively to the Minister for regulations (similar to byelaws) to be imposed to secure the more effective management of the common. But the regulations were limited in scope to restricting the turning out of entire (*i.e.* uncastrated) animals.

13. Reform of property law in the early twentieth century abolished the manorial system. To further safeguard common land, provisions were included in the Law of Property Act 1922 (subsequently consolidated in sections 193 and 194 of the Law of Property Act 1925). These provisions introduced a right of public access to certain commons (chiefly those in or close to urban areas, amounting to about one fifth of all common

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2 Repealed by the Statute Law Revision Act 1953.

3 Typically, such land was waste land of the manor. In some cases, rights of common continued to be exercised over the land concomitant with its use as a green, and provision was made under the Commons Registration Act 1965 for registration of a green as subject to rights of common.

4 However, the last inclosure order, made under the Commons Act 1876, was not confirmed by Parliament until 1914, in relation to Elmstone Hardwicke (Cheltenham). An analysis of orders made under the 1876 Act can be found on the Defra website at:

land), and a requirement for ministerial consent to works that prevent or impede access on all commons which remained subject to rights of common at that time.

14. The remainder of the twentieth century saw the pressure for access to common land grow but, following the Second World War, there was concern about a more insidious loss of common land and town or village greens through encroachment and abandonment of rights of common. Many commons had been ploughed up to increase agricultural production during the war, while others had fallen into disuse. The recreational needs of the public were also increasing. Growing motor traffic and demand for housing and other development were bringing different pressures to bear upon commons and greens. In 1955 a Royal Commission was established to enquire into whether any changes were needed in the law to promote and balance the needs of owners of land, commoners and the enjoyment of the public. The Royal Commission reported in 1958[5], and recommended legislation to promote:

- registration of common land and town and village greens,
- public access, and
- improved management.

15. It was not until the Commons Registration Act 1965 ('the 1965 Act') that some of the recommendations of the Royal Commission were implemented, and then only to deliver short-term measures to ensure the registration of common land and greens.

16. The 1965 Act was intended to establish definitive registers of common land and town and village greens in England and Wales and to record details of rights of common. Commons registration authorities (generally county councils) were appointed to draw up the registers. Applications were invited between 2 January 1967 and 2 January 1970[6] for the provisional registration of common land, greens, and rights of common, and registration authorities were also able to register land on their own initiative. The registers remained open for objection until 31 July 1972[7]. Disputed provisional registrations were referred to a Commons Commissioner (appointed under the 1965 Act) for determination, but unopposed provisional registrations became final automatically. The 1965 Act provided that, where land was eligible for registration under the Act (whether as common land or a town or village green), a failure to register it resulted in the land being deemed not to be common land or a green (as the case may be) after 31 July 1970[8]. Similarly, a failure to register rights of common which were eligible for registration caused the rights to cease to be exercisable[9] after the same date.

17. In practice the task of establishing registers was complex and the 1965 Act proved to have deficiencies. For example, some land provisionally registered under the Act was wrongly struck out, and other common land was overlooked and never registered. Many greens became registered as common land. Some grazing rights were registered far in excess of the carrying capacity of the common. The scope for correcting errors was limited. Furthermore, regulations made under the Act did not provide for sufficient notification of applications made for provisional registration of common land and rights of common, so that many provisional registrations became final without any objections and thus without independent appraisal of the claim made in the application. The Court of Appeal held that even where land had clearly been wrongly registered as common

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5 Command 462, 1957, HMSO.

6 Commons Registration (Time Limits) Order 1966 (SI 1966/1470) (a later date of 31 July 1970 applied in relation to land registered on the initiative of the registration authority).

7 Article 4(2) of the Commons Registration (Objections and Maps) Regulations 1968 (SI 1968/989), as amended by the Commons Registration (Objections and Maps) (Amendment) Regulations 1970 (SI 1970/384).

8 Section 1(2) of the 1965 Act, as prescribed by the Commons Registration (Time Limits) Order 1966 (SI 1966/1470), as amended.

9 Section 1(2)(b) of the 1965 Act states that such rights are rendered not 'exercisable'. In *Central Electricity Generating Board v. Clwyd County Council* [1976] 1 WLR 151, Goff J. concluded that the fact that rights of common were no longer exercisable meant that they were extinguished, and this finding is now generally accepted.

land, the Act provided no mechanism to enable such land to be removed from the register once the registration had become final[10].

18. Moreover, although the 1965 Act made provision for amendments to be made to the registers consequent on events which occurred after 1970, there was no obligation on persons interested in any entry in the register to seek such an amendment. Many events which in principle affected entries in the registers have not been registered, and the registers have become significantly out-of-date since 1970.

19. The 1965 Act also explicitly postponed action on the Royal Commission's recommendations to improve management of common land and introduce public access in the wake of registration.

20. Several initiatives were promoted over the intervening period in support of further legislation. An inter-Departmental working party reported in 1977 with recommendations for reform to commons legislation[11]. The (then) Countryside Commission set up the Common Land Forum which reported in 1986[12], reflecting a broad consensus between landowning, farming, nature conservation and recreational interests as the basis for legislation. Comprehensive legislation was later ruled out by the 1995 White Paper 'Rural England', and instead research was proposed to develop guidance for the management of common land (the conclusions of the research were subsequently published in 1998[13]). However, the Rural White Paper in 2000[14] included a commitment to legislate on common land as soon as parliamentary time allowed. Part I of the Countryside and Rights of Way Act 2000 provided for a public right of access (on foot) to all registered common land, which was fully implemented across England and Wales by October 2005.

21. The Government published a consultation paper in February 2000[15], to coincide with the introduction of the Countryside and Rights of Way Bill, on proposed reforms to legislation relating to common land and town and village greens. Two years later, building on responses to the consultation, the Common Land Policy Statement 2002[16] set out in broad terms the Government's intentions for future legislation relating to common land and town and village greens. A Stakeholder Working Group was set up in 2002 to seek a consensus on more detailed proposals on agricultural use and management of common land[17], on which there was further public consultation in 2003[18].

22. The Commons Act gives effect to the recommendations set out in the Common Land Policy Statement with respect to the registration of common land and town or village greens, works and fencing on common land, and the agricultural use and management of common land (sections 2, 3 and 5 of the Policy Statement). It also makes more limited changes to the law with regard to town or village greens (section 4), principally in relation to the registration of greens, and the criteria for registering new greens.

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10 *Corpus Christi College, Oxford v. Gloucestershire County Council* [1982] 3 All ER 995

11 *Common Land: preparations for comprehensive legislation — report of an inter-departmental working party*, Department of the Environment (September 1978), unpublished.

12 *Report of the Common Land Forum*, Countryside Commission (now the Countryside Agency), 1986, CCP215. Available on the internet at: www.countryside.gov.uk/Publications/articles/Publication_tcm2-29827.asp.

13 *Good Practice Guide on Managing the Use of Common Land*, DETR, June 1998. Available from Defra: see www.defra.gov.uk/wildlife-countryside/issues/common/manage/guides.htm for how to obtain a copy.

14 *Rural White Paper*, Defra, November 2000. Available on the internet at: www.defra.gov.uk/rural/ruralwp/.

15 *Greater Protection and Better Management of Common Land in England and Wales*. DETR, February 2000. Available on the internet at: www.defra.gov.uk/wildlife-countryside/consult/common/index.htm.

16 Defra, July 2002. Available on the internet at: www.defra.gov.uk/wildlife-countryside/issues/common/policy.htm.

17 The report and proceedings of the Stakeholder Working Group are available on the internet at: www.defra.gov.uk/wildlife-countryside/issues/common/manage/workgroup.htm.

18 *Consultation on agricultural use and management of common land*. Defra, August 2003. Available on the internet at: www.defra.gov.uk/corporate/consult/common-land/.